SUPREME COURT, U. S.

FILED

APR 17 1975

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 74-1309

DALE ERNEST BOREN,

Petitioner

vs.

STATE OF IOWA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

ROBERT C. GROSS
1900 I. E. Tower
Cedar Rapids, Iowa 52401

Attorney for Petitioner

INDEX

	Page
Citations to Opinions Below.....	1
Jurisdiction.....	2
Question Presented.....	2
Statutes Involved.....	2
Statement of the Case.....	3
Reasons for Granting the Writ.....	4
Authorities and Argument.....	5
Conclusion.....	9
Appendix A.....	A1
Appendix B.....	A3
Appendix C.....	A12

TABLE OF CASES

State v. McCall, 245 Iowa 991, 63 NW2d 874	6
Ross v. United States, 121 App. D.C. 233, 349 F2d 210	7
State v. Thomas, 249 Iowa 10, 85 NW2d 598	7
Columbe v. Connecticut, 367 US 568	8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

DALE ERNEST BOREN,

Petitioner

vs.

STATE OF IOWA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Iowa, entered on the 17th day of January, 1975.

CITATIONS TO OPINIONS BELOW

The judgment of the District Court of the State of Iowa in and for Linn County in the case of "State of Iowa vs. Dale Ernest Boren" is unreported and

is printed in Appendix A hereto, infra, p. A1. The opinion of the Supreme Court of the State of Iowa, printed in Appendix B hereto, infra, pp. A3 - A11, is unreported.

JURISDICTION

The opinion of the Supreme Court of the State of Iowa was entered on December 18, 1974. A petition for rehearing was filed with said Court, and was denied by order dated January 17, 1975. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Can a defendant be convicted of the crime of incest when no one specific act is proved by the State?

2. When the defendant has been lied to by an interrogating officer, can the resulting confession be used in evidence against him?

STATUTES INVOLVED

1. The Fifth and Fourteenth Amendments, Constitution of the United States of America.

STATEMENT OF CASE

On the evening of October 7, 1973, Linda Boren, then 16 years of age, daughter of the defendant, turned herself into the Cedar Rapids police station as a runaway. She made a statement to Detective Manchester in which she accused her father of incest after which a telephone call was placed to the Boren home requesting that both parents come to the police station.

At the police station, the defendant was taken to an interrogation room by Detective Robert B. Manchester and Douglas R. Fuller. A statement was taken from the defendant which was put in typewritten form and signed by the defendant. (State's Exhibit 2).

During the trial the prosecutrix testified to numerous acts of intercourse with the defendant between the ages of eight and sixteen. The specific act of intercourse relied upon by the State for conviction and which was to be described with "great particularity" (R. p. 10) was an act that took place between September 1 and September 15 of 1973. The prosecutrix testified about an act between September 1 and September 15 (R. p. 16).

For corroboration of the testimony of the prosecutrix, the State relied upon the statement that was introduced as State's Exhibit 2. Over defense objections, Exhibit 2 was received. Detective Manchester stated on the stand that he did not secure any admissions from the defendant until such time as he posed a hypothetical question (R. p. 18). In Detective Manchester's words: "I asked him what he would say if I told him what he would say if I told him that this daughter had been given a polygraph test or a lie detector test and that test had shown that everything she said to us was the truth."

The defendant took the stand to testify that on the evening that he was interrogated by the police he had been drinking over a considerable period of time, that he was confused and that he had only a vague recollection of the interrogation and of signing the statement. (Tr. p. 259 et seq.).

The jury brought in a verdict of guilty.

REASONS FOR GRANTING THE WRIT

1. The holding of the Iowa Supreme Court sanctions a conviction of a criminal offense when no particular act has

been proved to support a guilty verdict.

2. The holding of the Iowa Supreme Court permits the use in evidence of a confession which has been induced by false and untrue statements.

AUTHORITIES AND ARGUMENT

1. Denial of due process is the failure to observe that fundamental fairness which is essential to the very concept of justice. That fairness includes reasonable notice of the particular crime charged and an opportunity to defend against that particular crime.

Before trial commenced, Judge Vietor had ordered (Appendix C) the State to advise the defendant with great particularity as to the date of the alleged offense. The State thereupon elected an act of intercourse that took place between September 1 and September 15, 1973. Thereafter the prosecutrix, under the State's leading, accommodatingly testified as to an act of intercourse between those dates (R. pp. 15-17). She did nothing more than baldly recite the facts that occur whenever any act of intercourse occurs and did nothing more to identify it as a <u>particular act</u>. There were no details as to the time of day, people that may have been

present or absent from the home, day of the week, school day as opposed to non-school day, circumstances of dress, other significant household dates, etc. There was nothing by which the defendant could tie the alleged criminal act to any other act occurring within September 1 and September 15.

Other acts of intercourse were testified to by the prosecutrix. The subsequent conviction had to rest solely upon hearsay and reputation testimony. Iowa law permits the showing of other acts of intercourse to establish the defendant's lewd disposition or his incestuous leanings but they can do nothing more than that. State v. McCall, 245 Iowa 991, 63 NW2d 874. A specific act must be proved beyond a reasonable doubt. If that specific act has not been proved, then the defendant in the case must be considered as having been found guilty because of a welter of repellant charges or a flurry of rumors, all of which is clearly violative of his rights to due process.

The defendant had a right to defend himself against a specific charge, the particularity of which never emerged in the case. It would hardly seem necessary to say again that failure to allege and prove a specific criminal act by the

State is an egregrious example of a denial of justice. Ross vs. United States, 121 App. D.C. 233, 349 F2d 210.

2. The defendant was taken into the interrogation room by two detectives and resisted making any admissions up to a point when one detective asked him what he termed a "hypothetical" question: "I asked him what he would say if I told him that his daughter had been given a polygraph test or a lie detector test and that test had shown that everything she said to us was the truth." The defendant testified that at this point he "gave up." He felt that the entire world was conspiring against him and he then started giving whatever answers his questioners seemed to want. It is difficult to conceive of a more psychologically wounding blow than this false, untrue statement of the detective. The detective testified that he knew the falseness of his statement when he made it.

In Iowa, it would seem that the rule had been set in State vs. Thomas, 249 Iowa 10, 85 NW2d 598, in which was stated that a confession can never be received in evidence where the prisoner has been influenced by any threat or promise because the law cannot measure the force of the influence used nor

decide its effects upon the mind of the prisoner. In every case where there is any evidence at all that any degree of influence has been exerted upon the defendant, the declaration must be excluded. The wording of State vs. Thomas clearly embraces the facts of this case.

In Columbe vs. Connecticut, 367 US 568, the totality of the circumstances is to be the yardstick used to determine the voluntary nature of the defendant's statement. The circumstances in this particular case include a declaration induced by the fraud and deceit of the interrogator and which alone is so shockingly destructive of the defendant's rights as to make any other circumstances surplusage. Even without judicial declarations, any kind of a natural law involving out of the interplay of societal forces would dictate that a confession used in a criminal proceedings would be voluntary and not produced by a thumbscrew. This was not a voluntary statement. It was calculatingly produced by the fraud of the interrogator. The statement should have been excluded during the trial.

Because of the questions raised here, there can be no doubt that the defendant was effectively denied due process of law and that settlement of these

questions raised in this Petition for Writ of Certiorari is plainly in the interests of the administration of criminal justice.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT C. GROSS
1900 I. E. Tower
Cedar Rapids, Iowa

Attorney for Petitioner

APPENDIX A

IN THE DISTRICT COURT OF IOWA
IN AND FOR LINN COUNTY

STATE OF IOWA,	)	
	)	No. CRF 243-1073
Plaintiff	)	
	)	JUDGMENT AND
vs.	)	SENTENCE
	)	
DALE ERNEST BOREN,	)	
	)	
Defendant	)	

And Now, to-wit, on this 14th day of March, 1974, the defendant, Dale Boren, appears in open court with his counsel, Mr. Robert Gross, for sentencing. The State of Iowa is represented by Assistant Linn County Attorney Mr. Ronald Luehrsmann. No legal cause is shown why sentence should not be pronounced. It is the judgment of the Court that defendant, Dale Ernest Boren shall, be imprisoned in the Iowa State Penitentiary at Fort Madison, Iowa, for an indeterminate term not exceeding twenty-five (25) years at hard labor. Judgment is rendered under authority of Iowa Code Section 704.1 of the Iowa Code.

Mr. Baker reported proceedings.

Defendant is remanded to the custody of the Linn County Sheriff unless and until bond is posted.

Defendant is advised of his right to appeal. Appeal bond is set at $1,500.00.

/s/ William R. Eads
JUDGE OF THE 8TH JUDICIAL DISTRICT
OF IOWA

APPENDIX B

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Appellee,	)	Filed December
	)	18, 1974
v.	)	
	)	336
DALE ERNEST BOREN,	)	57164
	)	
Appellant.	)	

Appeal from Linn District Court -- William R. Eads, Judge.

Appeal by defendant from conviction by jury and sentence for incest--AFFIRMED.

Robert C. Gross, of Cedar Rapids, for appellant.

Richard C. Turner, Attorney General, Thomas Mann, Jr., Assistant Attorney General, and William G. Faches, County Attorney, for appellee.

Heard by MOORE, C.J., LeGRAND, REES, HARRIS, and McCORMICK, JJ.

McCORMICK, J.

Defendant appeals his conviction by jury and sentence for incest in violation of Code § 704.1. The State accused defendant Dale Ernest Boren of incest with his 16 year old daughter Linda based upon an incident alleged to have occurred between September 1 and September 15, 1973. Defendant's main contentions are that the trial court erred in receiving his written statement into evidence and in finding sufficient evidence of the specific act of incest for jury consideration. We affirm.

I. Linda Boren turned herself in at the Cedar Rapids police station the evening of October 6, 1973, as a runaway. She told detective Robert B. Manchester she had been beaten many times by her father and he had maintained an incestuous relationship with her since she was eight years old.

Manchester called Linda's parents to the police station. They arrived shortly after midnight. Linda's mother told Manchester she had suspected defendant of having intercourse with Linda several years before. Defendant was interrogated by Manchester and detective Douglas R. Fuller. He was fully advised of his relevant constitutional rights as

required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Manchester testified he advised defendant of his daughter's allegations.

At first, according to Manchester and Fuller, defendant denied Linda's accusations. Fuller testified that after further questioning defendant admitted that two or three years before he "had a few beers and might have had intercourse with Linda." Manchester said he then posed a question to defendant: "I asked him what he would say if I told him that his daughter had been given a polygraph test or a lie detector test and that test had shown everything she said to us was the truth." The officers testified defendant acknowledged that what his daughter said was true and gave a detailed statement which was later put in writing and signed by him at about 1:30 a.m. October 7, 1973.

Defendant admitted making oral and written admissions but said they were untrue and were made because accusations by the officers made him feel "like giving up on everything." He testified the officers confronted him with details and he simply acknowledged they were true.

In the statement defendant said he had sexual intercourse 50 to 60 times

with Linda, the first time when she was eight years old and the last about a month before the date of his interrogation.

Defendant's pretrial motion to suppress evidence of his oral and written statements was based on a contention that Manchester tricked him into giving them by his question suggesting Linda had passed a lie detector test. He alleged his statements were thus not voluntary. After evidentiary hearing his motion was overruled. At trial defendant objected to the State's offer of defendant's written statement on the same ground, and his objection was overruled. He assigns that ruling as error.

The applicable principles are fully reviewed in State v. Cooper, 217 N.W.2d 589 (Iowa 1974). There we summarized the rule where there is evidence of deception as follows:

> "Deception of any nature by representatives of the state cannot be condoned. However, we conclude deception standing alone does not render a waiver of constitutional rights involuntary as a matter of law unless the deceiving acts amount to a deprivation of

> due process. Nevertheless, deception becomes a factor to be considered in reviewing the totality of the circumstances in making the determination as to the voluntariness of the waiver even though the act does not per se produce exclusion." Id. at 597.

In examining the totality of circumstances shown by the record to determine the voluntariness of defendant's statements, we make our own independent evaluation of the evidence. "When constitutional safeguards are involved, we are obliged to make our own evaluation of the totality of the circumstances under which rulings on those rights were made." State v. Thomas, 205 N.W.2d 717, 721 (Iowa 1973). That is, when a constitutional issue is presented, the evidence relevant to that issue is reviewed de novo. State v. Elmore, 201 N.W.2d 443, 445 (Iowa 1972); see State v. Winfrey, 221 N.W.2d 269, 273 (Iowa 1974); State v. Cooper, supra, at 598; State v. Ware, 205 N.W.2d 700, 703 (Iowa 1973).

There is no suggestion from the evidence in this case that defendant was under any physical or mental disability at the time he was interrogated.

He was alert and rational. He was fully aware of his legal rights, and he knowingly and intelligently relinquished them. We do not believe Manchester's alleged "trick question" constituted coercion. It was a means of challenging defendant's veracity rather than a device calculated to overbear his will or impair his capacity for self-determination. In all the circumstances we believe his statements were the product of "an essentially free and unconstrained choice." Culombe v. Connecticut, 367 U.S. 568, 602, 81 S.Ct. 1860, 1879, 6 L.Ed.2d 1037, 1057 (1961).

We hold defendant's admissions were voluntary. The trial court did not err in admitting the written statement into evidence.

II. In ruling on a pretrial motion for bill of particulars the trial court required the State to specify as closely as possible the date of the offense charged. The county attorney's information alleged it occurred between September 1 and October 6, 1973. In response to the ruling, the State said the act occurred, to the best of Linda's recollection, between September 1 and September 15, 1973.

In her testimony at trial Linda

said defendant had sexual intercourse with her on that occasion in a bedroom of their home in Cedar Rapids. She also testified to numerous other similar events from the time she was eight years old, asserting they were occurring two or three times a week by the time she was 16.

Defendant contends Linda's inability to remember the exact date of the alleged offense effectively deprived him of his right to defend against it. He argues there was insufficient evidence of any specific act of incest so that his motion for directed verdict on the ground of insufficiency of evidence should have been sustained. We do not agree.

Viewing the record in its light most favorable to the State, we believe the charge was supported by substantial evidence. In addition to Linda's testimony, the defendant in his written statement admitted an act of incest during the period involved, and there was substantial evidence of similar prior acts. See State v. Staker, 220 N.W.2d 613, 617-618 (Iowa 1974). Lack of specificity in Linda's testimony was a proper factor for jury consideration in assessing her credibility, but the evidence was sufficient to justify

submission of the cause to the jury.

III. Defendant also contends the trial court erred in not instructing the jury to disregard defendant's admissions if it found they were not voluntary, without regard to their truth. The jury was fully and adequately instructed on voluntariness as it affected the weight to be given the statements. The jury was permitted to judge the credibility but not the admissibility of the statements.

We refuse to depart from the orthodox rule for determining questions of voluntariness and admissibility. Under this rule the trial court's determination of admissibility is final and, if the evidence is admitted, the weight to be given the evidence is left for the jury in the trial. State v. Winfrey, supra, at 272, and citations.

The trial court correctly instructed the jury on this issue.

IV. Defendant's final contention is that Linda was an accomplice and the conviction should have been set aside on his motion for new trial for lack of corroboration of her testimony. This contention fails for two reasons.

First, there was ample corroboration of Linda's testimony in defendant's alleged admissions. It is well settled that corroboration may come from a defendant's admission. State v. Williams, 207 N.W.2d 98, 107 (Iowa 1973). Second, corroboration was not required since Linda could not have been an accomplice. She was less than 17 years old and therefore below the age at which she could consent to sexual intercourse with a male over the age of 25. See State v. Anderson, 222 N.W.2d 494 (Iowa 1974); State v. McCall, 245 Iowa 991, 63 N.W.2d 874 (1954); §§ 698.1, 782.5, The Code.

We find no reversible error.

AFFIRMED.

APPENDIX C

On January 24, 1974, the defendant filed a motion in limine and a motion for a bill of particulars and, after a hearing, on January 25, 1974, the Court entered a ruling on the motions:

2. The Motion for Bill of Particulars is sustained to the extent that the State shall advise the defendant and his counsel with greater particularity as to the approximate date of the alleged offense, but the State need not be more specific than the good-faith recollection of the complaining witness permits.

3. Defendant's oral motion to require the State to elect a specific act of alleged sexual intercourse between the defendant and the complaining witness is sustained, and the State shall advise the defendant of the specific act upon which it rests this prosecution.

/s/ Harold D. Vietor
JUDGE OF THE SIXTH JUDICIAL DISTRICT OF IOWA